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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

**IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST**

ELIAB NER LOZADA, R.N.
RESPONDENT

FINAL DECISION AND ORDER
LS0003291NUR

The State of Wisconsin, Board of Nursing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Board of Nursing.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of their decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "notice of Appeal Information."

Dated this 7th day of July, 2000

Ann Brewer, R.N.

A Member of the Board

STATE OF WISCONSIN

BEFORE THE BOARD OF NURSING

IN THE MATTER OF

DISCIPLINARY PROCEEDINGS AGAINST

ELIAB NER LOZADA, R.N.,
RESPONDENT

PROPOSED DECISION

Case No. LS-0003291-NUR

SUMMARY

This is a disciplinary action by the Board of Nursing against a registered nurse, Eliab Ner Lozada. Mr. Lozada was alleged to have been convicted of crimes which were substantially related to the practice of nursing: obtaining

prescription drugs by fraud, and theft of drugs. Mr. Lozada did not answer the complaint or appear at the hearing. Being convicted of a criminal offense related to the practice of nursing is a violation of the rules of professional conduct for the nursing profession. Mr. Lozada's nursing license is suspended indefinitely.

PARTIES

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Complainant:

Division of Enforcement

Department of Regulation and Licensing

Madison, WI 53708-8935

Respondent:

Eliab Ner Lozada

2870 South 14th Street

Milwaukee, WI 53215

Disciplinary Authority:

Board of Nursing

1400 East Washington Ave.

Madison, WI 53703

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint (DOE case # 99 NUR 342) with the Board of Nursing on March 29, 2000. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent with a copy of the complaint by certified mail on April 5, 2000 to Eliab Ner Lozada, 2870 South 14th Street, Milwaukee, WI 53215. Copies were also sent to Mr. Lozada at 3177 West Mangold, Greenfield, WI 53221. These addresses were Mr. Lozada's last-known addresses on file with the department. The copies sent to the Greenfield address were returned to the department.

B. The Notice of Hearing informed Mr. Lozada that he was required to file an answer within twenty days of service. No answer was filed by Mr. Lozada.

C. Following the twenty-day period for the filing of an answer, a Notice of Prehearing Conference was mailed to the parties on May 3, 2000. The conference was scheduled for 10:00 A.M. on May 15, 2000. Shortly after the mailing, a person identifying herself as the respondent's wife called the undersigned administrative law judge. She confirmed the receipt of the notice, provided a telephone number for Mr. Lozada, and implied that he would be available for the conference.

D. Calls were made to Mr. Lozada's number as scheduled on May 15, 2000, but all calls were answered by machine. Messages were left identifying the reason for the call and directing Mr. Lozada to contact the undersigned. No return call was ever received.

E. A fact-finding hearing was scheduled for May 30, 2000, and a Notice of Hearing was mailed to the parties on May 15, 2000.

F. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on May 30, 2000. Mr. Lozada did not appear. The Board of Nursing was represented by attorney James Harris of the Department's Division of Enforcement. The hearing was recorded. Mr. Harris moved that Mr. Lozada be found in default under sec. RL 2.14, Wis. Admin. Code, and the motion was granted. Mr. Harris presented one exhibit and the testimony of one witness. The complaint along with the testimony and exhibits entered into

evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE STATUTES AND RULES

Statutes

441.07 Revocation.

(1) The board may, after disciplinary proceedings conducted in accordance with rules promulgated under s. 440.03 (1), revoke, limit, suspend or deny renewal of a license of a registered nurse, a nurse-midwife or a licensed practical nurse, may revoke, limit, suspend or deny renewal of a certificate to prescribe drugs or devices granted under s. 441.16, or may reprimand a registered nurse, nurse-midwife or licensed practical nurse, if the board finds that the person committed any of the following:

...

(b) One or more violations of this chapter or any rule adopted by the board under the authority of this chapter.

...

(d) Misconduct or unprofessional conduct.

...

Wisconsin Administrative Code

N 7.04 Misconduct or unprofessional conduct.

As used in s. 441.07 (1) (introd), Stats., "misconduct or unprofessional conduct" means any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public. "Misconduct or unprofessional conduct" includes, but is not limited to, the following:

(1) Violating, or aiding and abetting a violation of any law substantially related to the practice of professional or practical nursing. A certified copy of a judgment of conviction is prima facie evidence of a violation;

(2) Administering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law,

...

(15) Violating any rule of the board.

FINDINGS OF FACT

1. The respondent, Eliab Ner Lozada, is licensed to practice nursing as a registered nurse in the state of Wisconsin, under license number 130542. Eliab Ner Lozada's name is also listed in the records of the Department of Regulation and Licensing as Eliab Ner Lozada-Serrano.

2. On January 25, 2000, Mr. Lozada was convicted in Milwaukee County Circuit Court in case 99 CM 011715 of the crimes of (1) obtaining prescription drugs by fraud, and (2) theft of movable property.

3. The offenses which led to Mr. Lozada's convictions involved the diversion of a quantity of injectable morphine from patient supplies while he was on duty as a registered nurse at St. Francis Hospital between September 26, 1999 and October 3, 1999.

CONCLUSIONS OF LAW

I. The Board of Nursing has personal jurisdiction over the respondent, Eliab Ner Lozada, based on his holding a credential issued by the board, and based on notice under sec. 801.04 (2), Stats. Under sec. RL 2.08 (1), Wis. Admin. Code, a respondent may be served by mailing to his or her last-known address.

II. The Board of Nursing is the legal authority responsible for issuing and controlling credentials for registered nurses, under ch. 441, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 441.07, Stats., and ch. N 7, Wis. Admin. Code.

III. The respondent, Eliab Ner Lozada, is in default, under sec. RL 2.14, Wis. Admin. Code, and the Board of Nursing may enter an order on the basis of the complaint and other evidence.

IV. The circumstances of Mr. Lozada's convictions are substantially related to the circumstances of the practice of nursing. Mr. Lozada's convictions constitute unprofessional conduct, under sec. 441.07 (1) (b) and (d), Stats., and sec. N 7.04 (1), Wis. Admin. Code.

V. Mr. Lozada obtained a drug other than in the course of legitimate practice and as prohibited by law. This action constitutes unprofessional conduct, under sec. 441.07 (1) (b) and (d), Stats., and sec. N 7.04 (2), Wis. Admin. Code.

ORDER

THEREFORE, IT IS ORDERED that the license issued to the respondent, Eliab Ner Lozada, for practice as a registered nurse is suspended indefinitely, with provision for a stay of suspension as follows:

(1) Petition for Stay.

Mr. Lozada may petition the Board at any time for a stay of the suspension of his license for a period of three months. In conjunction with such petition, Mr. Lozada shall submit documentation of an evaluation performed by a health care provider acceptable to the Board of Mr. Lozada's current use and/or dependence on controlled substances including, but not limited to, morphine. The assessor shall submit a written report of his or her findings directly to the Board, including:

- a) a diagnosis of Mr. Lozada's condition;
- b) recommendations, if any, for treatment;
- c) an evaluation of Mr. Lozada's level of cooperation in the assessment process;
- d) recommendations regarding work restriction, if any; and
- e) Mr. Lozada's prognosis.

The report shall include a certification stating whether or under what conditions and limitations Mr. Lozada is fit to safely and competently return to the active practice of nursing. The assessment shall occur within thirty days prior to the date of its submission and reflect the fact that the person(s) performing the assessment received a copy of this Order.

(2) Board Action.

Upon its determination that Mr. Lozada can safely and competently return to the active practice of nursing, with or without conditions and limitations, the Board may stay the suspension for a period of three months, conditioned upon compliance with the conditions and limitations set forth in paragraph (3).

(3) Conditions of Stay

- (a) If the assessment report referred to in paragraph (1) above recommends continued

treatment for controlled substance abuse and/or dependence, Mr. Lozada shall maintain successful participation in a program of treatment with a health care provider acceptable to the Board.

- (b) If continued treatment is required under the stay Order, Mr. Lozada shall arrange for submission of quarterly reports to the Board from his treatment provider evaluating his

participation and progress in treatment. If the assessment recommends work restrictions, Mr. Lozada shall comply with all restrictions recommended. If the evaluator recommends

drug screenings and monitoring, Mr. Lozada shall comply with those requirements.

- (c) Mr. Lozada shall provide the Board with current releases complying with all state and

federal laws which authorize his treating health care professionals to release his records to the Board and to disclose the progress of his treatment to the Board.

- (d) Mr. Lozada shall be responsible for all costs associated with the assessment referred

to in paragraph (1) above, and for all treatment and reporting required under the terms of

the stay Order.

(e) In conjunction with the practice of nursing, Mr. Lozada shall not obtain access to or administer controlled substances except under the direct supervision of another registered nurse.

(f) Mr. Lozada shall refrain from the use of controlled substances not prescribed for valid medical purposes during the period of suspension and/or stay.

(g) Mr. Lozada shall provide all current and prospective nursing employers with a copy of

this Final Decision and Order and any subsequent stay Orders; arrange for submission of

quarterly reports to the Board of Nursing from his nursing employer(s) reporting the terms

and conditions of his employment and evaluating his work performance, and report to the

Board any change in his employment status within five days of such change. Mr. Lozada shall appear before the Board annually, if the Board requests such an appearance, to review the progress of treatment and rehabilitation.

(4) Petition for Successive Stays with or without Modification of Terms

(a) Mr. Lozada may apply for consecutive three-month stays of suspension, which shall be granted upon acceptable demonstration of compliance with the conditions and limitations imposed upon respondent's practice during the prior three-month period.

(b) Upon a showing by Mr. Lozada of complete, successful and continuous compliance for a period of five years with the terms and conditions set forth in paragraph (3) above and the receipt of evidence satisfactory to the Board that he can safely and competently engage in practice as a registered nursing in a manner which safeguards the interest of the public without limitations and conditions, Mr. Lozada may submit, and the Board may grant, a petition for termination of the period of suspension.

(c) Mr. Lozada may petition the Board in conjunction with any application for an additional stay to revise any of the above conditions. Denial in whole or in part of a petition under this paragraph shall not constitute denial of a license and shall not give rise to a contested case within the meaning of Wis. Stats. s. 227.01 (3) and 227.42.

IT IS FURTHER ORDERED that the respondent, Eliab Ner Lozada, shall pay the costs of this proceeding to the Department of Regulation and Licensing, as authorized by sec. 440.22 (2), Stats., and sec. RL 2.18, Wis. Admin. Code. If he fails to pay the costs within 90 days of the date of the cost order, any stay of suspension already granted shall be dissolved and no stay of suspension may be granted until the costs are paid in full.

IT IS FURTHER ORDERED that if the respondent, Eliab Ner Lozada, does not apply for a stay of suspension within three years of the date of this order, the license issued to him to practice as a registered nurse shall be revoked.

ANALYSIS

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats. and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Board of Nursing alleging that the respondent, Eliab Ner Lozada, violated rules regulating the practice of nursing in Wisconsin. The burden of proof is on the Division of Enforcement to prove the allegations of the complaint by a preponderance of the evidence. The division met its burden and proved the allegations of the complaint by a preponderance of the evidence, and discipline is appropriate.

The disciplinary complaint in this matter alleged that the respondent, Eliab Ner Lozada,

was convicted on January 25, 2000 of the crimes of (1) obtaining prescription drugs by fraud, and (2) theft of movable property (drugs). This was proven upon Mr. Lozada's default by the allegation in the complaint, and by the certified copy of the criminal complaint and judgment of conviction from Milwaukee Circuit Court, filed as exhibit 1.

The disciplinary complaint further alleged that the circumstances of these two convictions were substantially related to the circumstance of the practice of nursing. Such a relationship is necessary before a conviction may be considered as a basis for an adverse employment or licensing action. Secs. 111.31, 111.321, 111.322 and 111.335, Stats.; Law Enforce. Stds. Bd. v. Lyndon

Station, 101 Wis.2d 472, 305 N.W.2d 89 (1981); Gibson v. Transp. Comm., 106 Wis.2d 22, 315 N.W.2d 346 (1982); County of Milwaukee v. LIRC, 139 Wis.2d 805, 407 N.W.2d 908 (1987). According to the criminal complaint in exhibit 1, the offenses which led to Mr. Lozada's convictions involved the diversion of a quantity of

injectable morphine from patient supplies while he was on duty as a registered nurse at St. Francis Hospital between September 26, 1999 and October 3, 1999. Mr. Lozada reportedly removed injectable morphine from supplies to be administered to patients who did not, in fact, receive the morphine.

The practice of nursing requires a conscientious concern for patient well-being and safety which is utterly incompatible with falsifying records or stealing drugs which should be administered to patients. I find that the uncontroverted evidence of the criminal complaint proves by far more than a preponderance of the evidence that the circumstances of Mr. Lozada's convictions are substantially related to the circumstances of the practice of nursing. Consequently, Mr. Lozada's actions constitute violations of the rules of professional conduct for nurses and they are grounds for the imposition of discipline. The facts contained in the criminal complaint also lead to the logical conclusion that Mr. Lozada obtained drugs other than in the course of legitimate practice and as prohibited by law, which is a separate ground for a finding of unprofessional conduct and the imposition of discipline.

Discipline.

The purposes of professional discipline have been set forth by the Wisconsin Supreme Court in various cases involving attorneys, such as State v. Kelly, 39 Wis.2d 171, 158 N.W.2d 554 (1968), State v. MacIntyre, 41 Wis.2d 481, 164 N.W.2d 235 (1969), State v. Cory, 51 Wis.2d 124, 186 N.W.2d 325 (1970), and State v. Aldrich, 71 Wis.2d 206, 237 N.W.2d 689 (1976). Those purposes are (1) to rehabilitate the offender, (2) to protect the public, by assuring the moral fitness and professional competency of those privileged to hold licenses, and (3) to deter others in the profession from similar unprofessional conduct. That reasoning has been extended by regulatory agencies, including the Department of Regulation and Licensing, to disciplinary proceedings for other professions.

The most important consideration in this case is the protection of the public from this practitioner. The only facts available show that Mr. Lozada is willing to steal, to falsify records, and possibly to endanger patient health and well-being in order to obtain injectable morphine. A logical conclusion can be drawn that Mr. Lozada suffers from a drug problem. This was supported by the testimony of Jeffrey Schulz, an AODA level III counselor, Advanced Practice Social Worker, and masters level Psychologist at Milwaukee Psychiatric Hospital, who worked with Mr. Lozada for a two-month period earlier this year. Mr. Schulz testified that Mr. Lozada began a program of treatment for poly-substance dependency, but that Mr. Lozada dropped out of the program before completion. It would be unsafe to allow Mr. Lozada to practice as a registered nurse without significant controls and safeguards. Had Mr. Lozada participated in the disciplinary process, an order might have been drafted to permit him to continue to practice safely. However, since he did not choose to participate, the recommended order suspends Mr. Lozada's license indefinitely and places the burden on him of petitioning the board and presenting evidence that he can practice safely. Given his lack of cooperation to this point, it is possible that he will simply leave the profession. The order contains a provision that if he makes no attempt within three years to return to the practice of nursing, his license will be revoked.

The proposed order serves the secondary purpose of deterring other professionals from similar misconduct, as this action will be reported so that others may see and understand the serious consequences of diverting drugs. Not only may theft of drugs lead to criminal convictions and the potential loss of one's liberty, but it threatens one's privilege to practice a regulated profession such as nursing.

The provision in the recommended order for successive stays of the suspension serve the purpose of rehabilitating Mr. Lozada, if he is willing to take advantage of it.

Costs.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. The Board of Nursing has the discretion to impose all, some, or none of the costs of the proceeding. One approach is routinely to impose the costs of investigating and prosecuting unprofessional conduct on the disciplined individual rather than on the profession as a whole. Another approach is to use costs as an incentive to encourage respondents to cooperate with the process, and thus to impose costs only if the respondent is uncooperative or dilatory. Mr. Lozada failed to cooperate in any way with the Department in this action, and failed to appear at the hearing. His lack of cooperation and disregard for these proceedings make an order for costs appropriate.

Dated and signed: June 1, 2000

John N. Schweitzer

Administrative Law Judge

Department of Regulation and Licensing

